PERWIRA HABIB BANK BHD

v.

PENERBITAN ASA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
STEVE LK SHIM J
[APPLICATION FOR EXECUTION NO: 36-4-1998]
17 AUGUST 1998

CIVIL PROCEDURE: *Execution - Writ of seizure and sale - Whether necessary where subject matter involves immovable property - Whether provided for by Rules of High Court 1980 - Whether prohibitory order already authorises seizure of immovable property - Whether sale of immovable property a separate application*

CIVIL PROCEDURE: *Execution - Writ of seizure and sale - Validity - Prohibitory order wrongfully obtained - Effect upon writ of seizure and sale*

CIVIL PROCEDURE: *Execution - Prohibitory order - Whether valid - Whether could be granted by senior assistant registrar*

In this instance, the 2nd defendant, the judgment debtor ('JD'), applied to set aside the writ of seizure and sale ('WSS') and the prohibitory order ('PO') obtained against him by the plaintiff, the judgment creditor ('JC').

The JD claimed that the WSS was unnecessary as it involved immovable property. Also, that the PO should have been applied to the judge and not to the senior assistant registrar ('SAR') as the SAR did not have the competent jurisdiction to deal with such an application. Further, the PO had been wrongfully obtained by way of an improper procedure.

Held:

[1] An application has to be made for the PO to be issued. However, there is no specific mode or procedure provided under the Rules of the High Court 1980 ('RHC') as to how this is to be done. Nevertheless, there is a practice that it is to be done through the filing of a "Praecipe Untuk Perintah Larangan" addressed to the Pendaftar, Mahkamah Tinggi, who after consideration, would issue what is called a "Perintah Larangan Penahanan Dalam Pelaksanaan". It is also the practice that there be a concurrent application by the JC for the issuance of a WSS against the

JD through the filing of a "Praecipe Untuk Writ Pelaksanaan" although cases appear to indicate that protracted and separate applications are allowed. Further, it is the practice to apply for the PO before the WSS.

[2] By virtue of O. 1 r. 4(2) and O. 32 r. 9 of the RHC, an application can be dealt with by the Deputy Registrar, the SAR or the judge therein. As such, the JD's contention that the SAR did not have the requisite jurisdiction did not hold water.

[3] It is the practice in West Malaysia that in order to obtain a PO, it is necessary to apply by way of "Praecipe Untuk Perintah Larangan". This procedure had not been strictly followed in the instant case. There was a defect in the application which must militate against the granting of the PO. In the circumstances, the PO was not validly granted.

[4] There was substance in the contention that there was no necessity for the issuance of a WSS where the subject matter concerned immovable property. Firstly, the RHC do not specifically provide for one. Secondly, once the PO has been granted, it is an authorisation for seizure of the immovable property (O. 47 r. 6(1) and (3) of the RHC). Thirdly, the issue of sale of immovable property is subject to a separate application, usually by way of a summons in chambers (ss. 256 & 337 of the National Land Code 1965 and O. 47 r. 1(3) of the RHC). Such an application has to be made to and dealt with by the judge himself (O. 47 r. 7 of the RHC). A Practice Note No 2 of 1987 with the title "Orders For Sale Under the National Land Code 1965", had been issued to that effect.

[5] Given the practice that both the PO and the WSS is applied for concurrently, the WSS granted in the instant case was adversely affected since the PO was wrongfully obtained and therefore invalid. But if separate applications are allowed, then the procedure to be adopted is to first apply for the PO followed by an application for a WSS. Even if this procedure is accepted as a matter of practice, it would still militate against the granting of the WSS in this instance since the PO connected thereto was wrongfully obtained.

[Application allowed.]

Cases referred to:

Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd [1991] 1 CLJ 711 ***(refd)***

Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 16 ***(refd)***

K Murugesu v. Michael Chong Ngian Fong, K Murugesu v. Registrar of Titles & Ors [1980] 2 MLJ 84 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 256, 337
Rules of the High Court 1980, O. 1 r. 4(2), O. 32 r. 9, O. 46 r. 4, O. 47 rr. 6(1), (3), (5), 7

For the 1st and 2nd defendant - James Selva; M/s Ong Kok Bin & Co
For the respondent - Paul Kwong; M/s Azman Davidson & Co

Reported by Usha Thiagarajah

JUDGMENT

Steve LK Shim J:

This is an application by the 2nd defendant who is the judgement debtor (JD) for the setting aside of the writ of seizure and sale (WSS) as well as the prohibitory order (PO) dated 12 March 1998 obtained by the plaintiff who is the judgment creditor (JC) against the JD. It is supported by the affidavit of Adian Maniza bte Mohd Zain. The JC has opposed the application.

The facts show that pursuant to an application for execution, (encl. 6), the JC filed a "Praecipe Untuk Perintah Larangan" purportedly in accordance with Form 92 of O. 46 r. 4 Rules of the High Court (RHC) in consequence of which the PO dated 12 March 1998 was granted by the learned Senior Assistant Registrar (SAR) as per encl. 3. Concurrently, the JC also filed the "Praecipe Untuk Writ Pelaksanaan" (encl. 4) for which the SAR granted the WSS as in encl. 5.

The main complaint of the JD is (1) that the WSS is unnecessary in the instant case involving immovable property and (2) that the PO dated 12 March 1998 is invalid. I shall deal with them separately. For reasons which will become apparent later, I will deal with the second proposition first.

Fundamental to this second proposition are two underlying issues raised by the JD, namely, (1) that any application for a PO has to be made to a judge and not to the SAR or inversely speaking, that only a judge has competent jurisdiction to deal with such an application and not the SAR and (2) that the PO has been wrongfully obtained by way of an improper procedure.

In respect of the first issue, Mr. Selva, counsel for the JD has drawn our attention to O. 47 r. 6(1) and (5) RHC which comes under the heading "Writs of Seizure And Sale" and which stipulates:

> 6. Where the property to be seized consists of immovable property or any registered interest therein the following provisions shall apply:

(1) Seizure shall be made by an order prohibiting the judgment-debtor down transferring, charging or leasing such property, or interest. For the purpose of this rule 'charging' shall include the creation of a lien by deposit of a document of title;

(5) **Upon the application of any judgment creditor on whose application a prohibitory order has been issued the court or a Judge**, if it or he considers that special circumstances render an extension just, may from time to time by order extend the period of six months ...

It is counsel's contention that the words underscored above can only be construed to mean (a) that a proper application has to be made and (b) that such application be made to a judge and not to the SAR. He further contends that in the instant case the PO was granted by the SAR who had no competent jurisdiction to do so.

Let me say at the outset that I accept the stand taken by counsel that an application has to be made for the PO to be issued. However, there is no specific made or procedure provided under the Rules as to how this is to be done but I understand there is a practice that it is done through the filing of a "Praecipe Untuk Perintah Larangan" addressed to the Pendaftar, Mahkamah Tinggi, who, after consideration, would issue what is called a "Perintah Larangan Penahanan Dalam Pelaksanaan". It is also the practice that there would be a concurrent application by the JC for the issuance of a WSS against the JD through the filing of a "Praecipe Untuk Writ Pelaksanaan", although there have been cases which appear to indicate that protracted and separate applications were allowed. (See *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 16; *K Murugesu v. Michael Chong Ngian Fong, K Murugesu v. Registrar of Titles & Ors* [1980] 2 MLJ 84; *Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd* [1991] 1 CLJ 711). The same cases also seem to indicate that where separate applications were made, it was the practice to apply for the PO before the WSS.

Mr. Selva has further submitted that the SAR was not the competent jurisdiction to deal with any application for a PO. In this connection, he draws support from O. 47 r. 6(5) which I have alluded earlier, placing particular emphasis on the words "the court or a judge" therein. Now, the word "court" has been defined under O. 1 r. 4(2) which reads:

(2) In these rules, unless the context otherwise requires, 'Court' means the High Court or any one or more Judges thereof, whether sitting in Court or in Chambers, or the Registrar; but the foregoing provision shall not be taken an affecting any provision of these rules and, in particular, Order 32 rule 9, by virtue of which the authority and jurisdiction of the Registrar is defined and regulated.

And O. 32 r. 9 reads:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may be by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

In the light of these rules, I am of the view that an application can be dealt with by the Deputy Registrar, or the SAR or by the judge himself if he so wish. In the circumstances, Mr. Selva's contention that the SAR has not the competent jurisdiction holds no water.

I come now to the second underlying issue raised by the JD contending that the PO dated 12 March 1998 has been wrongfully obtained. The complaint is that the JC had obtained the PO through a procedure which was meant for a WSS and therefore the PO granted by the SAR is invalid. In this connection, Mr. Selva refers to encl. 2 which although in effect an application to the SAR for the issuance of a WSS against the JD nevertheless bears the heading "Praecipe Untuk Perintah Larangan". The body of this praecipe however seeks an issuance of a WSS. And it was on the basis of this praecipe that the SAR apparently granted the PO in encl. 3. As I have described earlier, it is the practice as I understand it in West Malaysia that in order to obtain a PO, it is necessary to apply by way of "Praecipe Untuk Perintah Larangan". This procedure has not been strictly followed in the instant case. There is a defect in the application which must militate against the granting of the PO. In the circumstances, the PO in question cannot be said to have been validly granted. This I so hold.

The first proposition now calls for consideration. Here, it is contended that, as a matter of law, there is no necessity for the issuance of a WSS where the subject matter concerns immovable property. There is substance in the contention. I say so for the following reasons. First, the Rules do not specifically provide for one.

Secondly, once the PO has been granted, it tantamounts to an authorisation for seizure of the immovable property. This is evident in the provisions of O. 47 r. 6(1) and (3) which read:

> 6. Where the property to be seized consists of immovable property or any registered interest therein the following provisions shall apply:
>
> (1) Seizure shall be made by an order prohibiting the judgment-debtor from transferring, charging or leasing such property or interest ...

(2) No prohibilitory order issued under this rule shall affect any immovable property or registered interest therein and no immovable property or registered interest therein shall be deemed to have been seized until such prohibitory order shall have been registered as provided by any written law relating to such law.

Thirdly, the issue of sale of immovable property is subject to a separate application, usually by way of summons in chambers. (See ss. 256 & 337 National Land Code 1965 and O. 47 r. 1(3) RHC). It is to be noted that such application has to be made to and dealt with by the judge himself. This is reflected in O. 47 r. 7. Indeed, a Practice Note No. 2 of 1987 under the title "Orders For Sale Under the National Land Code 1965" has been issued to that effect.

Be that as it may, it is the practice, as I have said, for the JC to apply for both the PO and the WSS concurrently and this is done through the procedure which I have described earlier. Given such a practice, the position in the instant case is that the WSS granted would have been adversely affected since the PO is found to have been wrongfully obtained and therefore invalid. The said WSS would have suffered the same fate. But if separate applications are allowed as some of the authorities, which I have cited, seem to indicate, then the procedure to be adopted is to first apply for the PO to be followed by an application for a WSS. Even if this procedure is acceptable as a matter of practice, it would still militate against the granting of the WSS in the instant case since the PO connected thereto has been declared to have been wrongfully obtained. The said WSS would have been similarly tainted.

In the circumstances and for all the reasons stated, I find there is merit in the JD's application. I will therefore allow the application and order in terms of prayers (a), (b) and (c) thereof.